



BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

OPINIONS BELOW

The opinion of the District Court (Johnson, J.) is reported in 30 F. Supp. 930. It appears also at p. 118 of Brief for Appellants and Appendix filed in the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals (Judge Biggs) has not been officially reported. It will be found at p. of the record.

II.

JURISDICTION

The jurisdiction of this court is invoked under Section 23 of the Bankruptcy Act of June 22, 1938, [11 U. S. C. 63] and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, Sec. 1, 28 U. S. C. Sec. 347, since this is a cause in which a final decree has been entered. The decree of the Circuit Court of Appeals was entered September 20, 1940, and no petition for rehearing was prayed for.

III.

STATEMENT OF THE CASE

A full statement of the case is included in the petition.

IV.

**SPECIFICATIONS OF ERRORS INTENDED TO BE
URGED**

1. The Circuit Court of Appeals erred in failing to hold that in bankruptcy proceedings, wages of laborers as administrative expenses, are prior in distribution to tax claims.

2. The Circuit Court of Appeals erred in failing to hold that in bankruptcy proceedings, liens for taxes shall be postponed in payment to the administrative expenses and wages for laborers.

3. The Circuit Court of Appeals erred in failing to decree distribution of the debtor's estate in the Trustee's hands in accordance with the report of the Special Master and the order of the District Court.

4. The Circuit Court of Appeals erred in reversing the order of the District Court.

V.

ARGUMENT

"... anyone who really possesses what has been called the historic sense must, so it seems to me, dislike to see a rule or an idea unfitly surviving in a changed environment."*

The Chandler Act is not a new bankruptcy act. It is merely amendatory of the old Act of 1898, and does not change the essential theory or structure of the 1898 Act in so far as straight bankruptcies are concerned. But its every amendment and change was intended by Congress to meet the changes in economic conditions and in business practices which have developed since its original enactment. The statement of Mr. Justice Douglas, then Commissioner on the Securities and Exchange Commission, at the hearing before the Committee on the Judiciary House of Representatives (75th Congress, 1st Session) on the revision of the Bankruptcy Act, that [the philosophy underlying the bill may perhaps make its provisions clearer],¹ applies as well to Sections 64 (a) and 67 (b) and (c) [11 U. S. C. 104 (a) and 107 (b) and (c)] as to Chapter X upon which the learned Commissioner was then making his observations. The right of labor to be heard by the Reorganization Court because [reorganization frequently entails labor displacement],² was not enacted by a Congress that intended in another section that in the event of a liquidation of the business that labor shall not only be displaced but actually prostrated by denying it the wages which it had already earned by preferring taxes due to the United States or other taxing authorities. Such philosophy is clearly erroneous, because they will only fall back on the relief rolls of these

* 3 Maitland, *Collected Papers* (1911) 486.

¹ p. 163—Hearing Serial 9—June 1-9, 1937.

² p. 188 *ibid.*

taxing authorities. In March 1938, before the passage of the Chandler Act, Judge Watson, U. S. District Judge for the Middle District of Pennsylvania handed down an opinion in the case of *The Philadelphia and Reading Coal & Iron Co. v. Van Dusen, et al., Trustees for the Northumberland Mining Company*³ setting forth these facts from the official records of his Court:

"In the Pennsylvania Anthracite Industry it has long been the practice of operating companies to withhold wages from workmen for a certain period of time, usually two weeks, for bookkeeping reasons. As a result when such companies come into this Court under the provisions of the Bankruptcy Act or under section 77 B, large amounts of wages remain unpaid. Although the sums due individual workmen are comparatively small, the loss of it is disastrous to them. In addition to being thrown out of work, the men are without reserves to sustain themselves while seeking other employment and, unless protected, they may become public charges. It has always been my opinion that a fund should be set up by the coal companies in the nature of a trust for the purpose of protecting the wages of mine workers which are due but unpaid. During the past few years it has been the duty of this Court to supervise bankruptcy and reorganization proceedings in several cases involving coal companies. In six of those cases¹ a total of more than a half million dollars in wages were defaulted. . . ."

In the footnote the Court cites: "Lattimer Coal Company with defaulted wages in the sum of \$121,118; Wyoming Valley Collieries Co. with defaulted wages of \$120,000; Scranton Coal Co. with a defaulted wage schedule of \$97,000; Northumberland Coal Co. defaulting in wages

³ This opinion is unreported, but the case was appealed to the Circuit Court of Appeals for the Third Circuit, *P. & R. Coal Co. v. Trustees Northumberland Coal Co.*, 103 F. (2) 869, cert. denied; *Olley v. Phila. & Reading Coal & Iron Co.*, 60 S. Ct. 990, and the opinion can be found on p. 798 of the record.

and compensation of \$158,928; Humbert Coal Co. with a default in wages of \$13,050; Upper Lehigh Coal Co. default in wages of \$21,280, or a total of \$531,385."

While the learned Court explains later in that opinion, that "much of the amounts due have not been and cannot be paid to the men", payments were made in some cases due to the Court's insistence "on the payment of wage claims to the fullest possible extent before considering any other aspect of reorganization proceedings, and in liquidation proceedings to interpret as liberally as possible the Statutes granting priorities to workmen." Is it any wonder, therefore, that Congress with such figures available to them made such "extensive" changes in section 67 that one Referee in Bankruptcy writing on "the Chandler Act" said "the changes in this section are so extensive that any kind of a complete analysis thereof is impossible within the limits of this discussion."⁴ We respectfully submit that the Circuit Court of Appeals characterization of this section as "comparative slight rearrangements" is erroneous.

Public policy in this "changed environment", in which the struggle for livelihood is so much more intensified than it was in 1926, when the last change relating to wage claims was made to the Bankruptcy Act of 1898, made new legislation by the Congress necessary "to protect from loss . . . a large class of persons whose dependence upon their earnings for their support and maintenance renders their loss even for a short period of time a matter of serious import."

Could Congress subordinate all statutory liens, including taxes, to wage claims in a bankruptcy distribution.

⁴ Carl Wilde, "The Chandler Act", 14 *Indiana Law Journal* (Dec. 1938) 128.

(a) Congress has the power to subordinate taxes to wage claims in bankruptcy distribution.

Article I, Sec. 8, Cl. 4 of the United States Constitution provides :

“The Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States”

It was long ago decided that Congress may reserve to the United States, under this clause, certain priorities in the settlement of a bankrupt's estate.

United States vs. Fisher, 2 Cr. 358 (1805).

State laws in conflict therewith are suspended.

Re Klein, 1 How. 277, 281 (1843) ;

Globe Bank & Trust Co. vs. Martin, 236 U. S. 288, 298 (1916).

In *Guarantee T. & T. Co. vs. Title G. & S. Co.*, 224 U. S. 152, 32 S. Ct. 457, 56 L. Ed. 706, Mr. Justice McKenna observed :

“The (Bankruptcy) Act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of the claims *even of the sovereign* in favor of those who necessarily depend upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants.” (Italics ours)

This case was cited with approval by the Supreme Court in laying down the doctrine that claims for taxes

due the United States, state, county, district or municipality were entitled to priority of payment over claims for wages whenever it did not appear that the particular tax had been subordinated to claims for wages by some relevant law.

Oliver vs. United States, 268 U. S. 1, 45 Sup. Ct. 386, 69 Law Ed. 817.

Counsel for wage claimants willingly concede that prior to the Bankruptcy Act of 1938, no relevant Federal law was enacted to "subordinate" taxes to claims for wages.

City of Richmond vs. Bird, 249 U. S. 174, 39 Sup. Ct. 186, 63 Law Ed. 543;

Miners Savings Bank of Pittston vs. Joyce, (C. C. A. 3), 97 Fed. 2d 973.

But on June 22, 1938, Congress saw fit to revise the entire law of bankruptcy; and in so doing did enact "relevant law" subordinating taxes to wage claims. Congress rewrote Sec. 64, and incorporated two entirely new provisions in Sec. 67. Inasmuch as the statutory law which gave rise to the above two decisions is no longer on the books, this court must construe the new provisions.

Hereafter, appellees shall attempt to point out how and in what respects Congress has seen fit to "subordinate" taxes to wage claims.

(b) The Bankruptcy Act of June 22, 1938, specifically postpones the payment of Statutory Liens, as designated in Sec. 67b and 67c, to debts specified in clauses 1 and 2 of subdivision a of Section 64, namely, actual and necessary costs and expenses of preserving the estate and wages not to exceed \$600 earned within three months of the commencement of the proceeding.

In the case at bar, distribution was first possible subsequent to the enactment of the Bankruptcy Act of June 22, 1938. The law when distribution is made, and not the law at the time of adjudication, is controlling when determining the priority of wages over taxes.

Collier on Bankruptcy, 13th Ed., Supplement 1935,
p. 542;

Adams vs. Bowen, (C. C. A. 1) 46 Fed. 2d 294;

City of Chelsea vs. Dolan, (C. C. A. 1) 24 Fed. 2d
522;

Matter of Baldwin, (D. C. Pa.) 4 F. Supp. 90.

The Bankruptcy Act of June 22, 1938, provides in Sec. 64a, clauses 1-4, as follows:

“The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to the filing of the petition; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administra-

tion, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) wages, not to exceed \$600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) where the confirmation of an arrangement or wage earner plan or the bankrupt's discharge has been refused, revoked or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under this Act, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes legally due and owing by the bankrupt to the United States or any state or any subdivision thereof: Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: And provided further, That in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the Court."

Counsel begs leave to make the following observations:

(a) Wage claim priority was moved up next to costs of administration.

(b) "Taxes legally due and owing by the bankrupt to any . . . state or subdivision thereof" was given fourth priority instead of the old mandate of Congress that the trustee should first pay taxes. Cf. Act of 1898, Sec. 64a as amended 1926.

In view of the long-time dispute as to the actual status of tax liabilities, it is significant that Congress did not place in a special category in Sec. 64 those taxes which were "liens", and especially so in view of the fact that the legislators in Congress from the forty-eight states were well aware that they themselves and the legislators of their home states had enacted laws beyond number making taxes of all sorts a "lien" on the property subject to tax. "Taxes legally due and owing", especially on real estate, are almost automatically "liened". See Penna. Act of 1931, May 29, P. L. 280, Sec. 4, as amended 1933, May 22, P. L. 940, Sec. 1, 1939, June 20, P. L. 498, Sec. 2, 72 P. S. Sec. 5971 d; and Act of 1923, May 16, P. L. 207, Sec. 2, 53 P. S. Sec. 2022. We refer only to Pennsylvania tax lien law. It must be evident that each of the forty-eight states have different tax lien laws, mechanics lien laws, and the myriad of other statutory lien laws that legislatures have enacted. No bankruptcy act could possibly treat such a confusion other than by referring to "taxes legally due and owing". But to cover the further question of liens, it was necessary to write *two brand new* provisions.

The reason, it is submitted, that Congress did not specify more about taxes as liens in Sec. 64a, is because the law is made explicit in Sec. 67 b, as follows:

"The provisions of Section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or

other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under Chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court."

As a preface to the consideration of this section, it should be noted that Sec. 67 d of the Act of 1898 provided that "liens given or accepted in good faith for a present consideration shall, to the extent of such present consideration only, *not be affected by this act.*" (Italics ours.) Under that clause tax liens were upheld as apart from the act and as "not affected by the Act". See *Miners Savings Bank of Pittston vs. Joyce*. But now, Sec. 67 b, includes these statutory liens *in the Act*.

Thus Congress has eliminated tax liens from the category of contractual liens and has, by Sec. 67b, delineated a new category of "statutory liens, in favor of employees, contractors, mechanics, landlords, or other classes of persons and statutory liens for taxes and debts owing to the United States, or any State or subdivision thereof." Congress did not differentiate between a "statutory lien" on real estate and a "statutory lien" on personal property. It merely said that such a lien (on personalty or realty) may be valid against the trustee. The fact that Congress cate-

gorized a municipality's tax lien on land with the right of a landlord to distrain on his tenant's goods and a contractor's claim to look to the product of his labor is inescapable. It is submitted that Congress properly so categorized these "statutory liens" because in each instance the so-called "lien" is the utilization by the legislature of an old common law or contractual concept for the purpose of an added protection of the taxing authority, the contractor, or the landlord.

Having created a category of "statutory liens" what did Congress provide thereon? Sec. 67c supplies this:

"Where not enforced by sale before the filing of a petition in bankruptcy or of an original petition under Chapter X, XI, XII, or XIII of this Act, though valid under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property not accompanied by possession of such property, and liens whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act, and, except as against other liens, such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act."

The problem here is one of judicial construction—and it is clear: What do the words "statutory liens" mean? They can only refer to the "statutory liens" set forth in the preceding section 67b. In that section, they arise on real and personal property. In Sec. 67c, statutory liens and liens whether statutory or not of distress for rent are postponed to administration costs and wage claims. Are these "statutory liens" limited? Quite the contrary. The section refers to "statutory liens", *including* liens for

taxes or debts owing to the United States or to any state or subdivision thereof, on personal property not accompanied by possession of such property. (*Italics ours.*) Not only are the "statutory liens" categorized in 67b set forth but there is also included "liens for taxes * * * on personal property."

Judge Johnson, in the opinion of the lower court, observed that "taxes", as used in Sec. 64, could not mean "tax liens" because then Sec. 67c would have been needless. Sec. 67b refers to "statutory liens" and Sec. 67c refers to "statutory liens". If there be two tax liens, one on realty and one on personal property not accompanied by possession, why should they be treated differently? Congress did not differentiate in Sec. 67b, and "included" personal property liens in Sec. 67c.

It is submitted that what Congress said and what Congress intended was to prevent the costs of administration and the wages of workmen from being eaten up by the claims of statutory lienors, be they on real or personal property. Why should there be one law for the bankruptcy administration and workingman in a rented factory and an entirely different law where the factory is owned by the bankrupt? If Congress had desired such a result, Sec. 67c would read that "statutory liens on personal property not accompanied by possession * * * are to be postponed in payment". Instead it reads, construing it with the section to which it refers, that "statutory liens in favor of employees, contractors, mechanics, landlords or other classes of persons and *statutory liens* for taxes owing to the United States, etc. including liens for taxes owing to the United States, etc. on personal property not accompanied by possession of such property are postponed to administration costs and wages."

The circuit court refused to consider the provisions of Sec. 67b in determining the meaning of "statutory

liens". The district court merely attempted to construe Sec. 64a—and determined that "taxes" could not mean tax liens. That is conceded. But the "statutory liens" of 67b which are postponed by 67c are liens on realty, including tax liens on personal property. Such a construction would rank them equally so that there never could be, as Judge Johnson observes (A. 121) a situation where tax liens on personalty came ahead of tax liens on realty. Under the lower court's construction, the problem in any bankruptcy case would be solely whether the property as to which the lien is asserted is realty or personalty—if realty, it must be paid ahead of administration expenses and wages; if personalty, postponed. Such a distinction has no foundation in reason. No cases construing this new section have been found to support such a distinction in law. And by the plain words of Sec. 67b and 67c, Congress has clearly expressed its intention that statutory liens as a matter of Federal policy, are not to consume a bankrupt estate in disregard of the costs of creating such an estate and the wages of workmen earned in creating the res.

One cannot separate the costs of administration of a bankrupt estate and the laborers' wages claims in these sections. Congress knitted them together when it referred to them as "debts specified in clauses (1) and (2) of subdivision (a) of Section 64". Certainly Congress never intended that the costs of Administration shall be subrogated to any other debt.

(c) Conclusion.

It is, therefore, submitted that the views of the Circuit Court of Appeals are erroneous, that a writ of certiorari should be granted and this Court should review the decree

of the Circuit Court of Appeals for the Third Circuit and finally reverse it.

Respectfully submitted,

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